84-1086

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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

SIDNEY PERKINS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeal for the Third Circuit (C.A. No. 84-1207; E.D. Pa. Cr. No. 83-00002-01).

PETITION FOR A WRIT OF CERTIORARI

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I. QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in failing to apply a *per se* rule of reversal where Petitioner and two co-defendants were represented by the same trial attorney and where, prior to the commencement of trial, Petitioner objected to this multiple representation and where, in the face of this objection, no colloquy or hearing was conducted by the trial court in order to ascertain whether any conflict of interest was likely to arise, as required by Rule 44(c), Federal Rules of Criminal Procedure.

II. PARTIES TO THE PROCEEDING IN THE COURT BELOW

Petitioner Sidney Perkins, together with North Broward Industries, Inc., Government Sales Division, and Southern Commercial, Inc., were all Appellants in the United States Court of Appeals for the Third Circuit in connection with their appeals from the judgments of conviction and sentence rendered by the United States District Court for the Eastern District of Pennsylvania. North Broward Industries, Inc., Government Sales Division was the Appellant in C.A. No. 84-1231 and Southern Commercial, Inc., was the Appellant in C.A. No. 84-1232. The appeals of these two corporations, together with that of Petitioner, were consolidated for purposes of briefing and argument by the United States Court of Appeals for the Third Circuit. Those two corporate appellants are not Petitioners herein and will not seek a Writ of Certiorari.

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IV. PETITION FOR WRIT OF CERTIORARI

Petitioner Sidney Perkins prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit (C.A. No. 84-1207) which affirmed the judgment of conviction entered upon a jury verdict in the United States District Court for the Eastern District of Pennsylvania.

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No. ____

IN THE

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SIDNEY PERKINS,

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v.

UNITED STATES OF AMERICA,

Respondent

On Writ of Certiorari to the United States Court of Appeal for the Third Circuit (C.A. No. 84-1207; E.D. Pa. Cr. No. 83-00002-01).

PETITION FOR A WRIT OF CERTIORARI

VI. JURISDICTIONAL STATEMENT

Petitioner requests this Court to review the Judgment of the United States Court of Appeals for the Third Circuit dated October 30, 1984 affirming Petitioner's convictions for conspiracy to defraud the United States (18 U.S.C. §371), bribery of a federal official (18 U.S.C. §201(b)), unlawful gratuities to federal officials (18 U.S.C. §201(f)), wire fraud (18 U.S.C. §1343), violations of the False Claims Act (18 U.S.C. §287) and a violation

of the Racketeer Influenced & Corrupt Organizations Act (18 U.S.C. §1962).

This Petition for Writ of Certiorari is being filed within sixty days of the date of the Judgment Order of affirmance as is required by Rules 20.1 and 20.4 of the Rules of the Supreme Court of the United States. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(I).

VII. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Rule 44(c), Federal Rules of Criminal Procedure, provides:

> "(c) *Joint Representation.* Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict

of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

VIII. STATEMENT OF THE CASE

In January 1983 a United States Grand Jury sitting in the Eastern District of Pennsylvania returned a forty-two count Indictment against Petitioner Sidney Perkins and two corporations as well as three other individuals, all of whom were, or had been, employees of the federal government. In briefest summary, the Indictment charged that acting through the two defendant corporations[1] and four other corporations, Petitioner had illegally manipulated competitive bid contracts between these companies and the Defense Industrial Supply Center ("DISC") of Philadelphia, an agency of the Defense Logistics Agency which was an agency operating under the Department of Defense. These contracts largely concerned the supply of spare parts for all branches of the United States military.

The scheme was characterized by: bribery of co-defendant Preston Wallace[2], a contracting officer with DISC; gratuities to co-defendant Bernard Osser, an employee in the Post-Awards division of DISC; and gratu-

1. Both of the co-defendant corporations were wholly owned and, in large measure, operated by Petitioner. One of these corporations was North Broward Industries which was a direct seller to the Department of Defense. The other defendant corporation, Southern Commercial, Inc., did not do business directly with the Department of Defense but, rather, sold goods to the Department of Defense through other alleged co-conspirator corporations or, in the view of the defense, sold goods to the other co-conspirator corporations which were in turn resold by such corporations to the Department of Defense. Employees of the two defendant corporations — and former employees of the two defendant corporations — testified at the trial of this case.

2. Wallace pled guilty before trial and did not testify at Petitioner's trial.

ities to Rose Morris, a clerical employee of the Naval Air Technical Services Facility.[3]

Additionally, the Indictment charged a scheme to defraud by use of the telephone in connection with one of the non-codefendant corporations, charged the supplying of counterfeit parts to DISC or its designees, and charged Perkins with operating the affairs of a group of corporations ("the enterprise") through a pattern of racketeering activity including bribery, gratuities and wire fraud.

The case was tried before the Honorable Edward N. Cahn and a jury sitting at Philadelphia, Pennsylvania, in May and June of 1983, at which time the jury returned a verdict of guilty as to the bulk of the Counts.

Post-verdict motions were later denied[4], and the District Court sentenced Petitioner to a total term of imprisonment of ten years, to be followed by a five year term of probation, and imposed fines totalling $195,000.

Petitioner, together with the two corporate codefendants, filed consolidated appeals from the judgments of conviction with the United States Court of Appeals for the Third Circuit which, on October 30, 1984 rendered a Judgment Order affirming the judgments of conviction in all respects.[5] This Petition follows.

At arraignment in January 1983, and continuing throughout the pre-trial proceedings up until the day scheduled for trial (May 9, 1983), Petitioner and the two corporate defendants, North Broward Industries, Inc., Government Sales Division, and Southern Commercial, Inc., were represented by the same attorney. Immedi-

3. This Facility was located adjacent to the DISC premises.

4. The trial court filed a Memorandum Opinion in support of its denial of post-verdict motions which is attached hereto at Appendix, pp. 3a, *et seq.* This opinion does not address the issue presented in this Petition.

5. The Judgment Order, which is set out at pp. 1a-2a of the Appendix hereto, denied relief sought, *inter alia*, on the ground herewith presented.

ately prior to the commencement of jury selection and trial, and pursuant to Rule 44(c), the Court conducted a colloquy, the entire contents of which is as follows:

> "MR. SMITH [Assistant U.S. Attorney]: May I ask the Court to direct its attention very briefly to one additional matter which we touched on a few weeks ago. That is the question of the issue of multiple representation by Mr. Rutter of two corporate defendants and Mr. Perkins as an individual. Pursuant to your direction, an affidavit was submitted and signed by Mr. Perkins which, I believe, addresses the question of multiple representation and is a satisfactory waiver, but Mr. Huyett called my attention to Rule 44(c), which is the appropriate rule, which directs that if two or more defendants jointly charged are represented by the same attorney, the Court shall promptly inquire and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation.
>
> "And it seems to us, Your Honor, that it may be appropriate for the Court to question counsel and Mr. Perkins, to at least repeat for the record now the averments of the affidavit.
>
> "THE COURT: I am willing to do that.
>
> "MR. SMITH: Thank you.
>
> "MR. RUTTER: May I have a minute to speak to Mr. Perkins, please?
>
> "THE COURT: Sure.
>
> "MR. RUTTER: Thank you. You want him at the podium, Your Honor?
>
> "THE COURT: Please.
>
> "MR. RUTTER: I don't have a copy. May I borrow it, sir?

"THE COURT: Mr. Perkins, my name is Judge Cahn, and the Government has called to my attention a particular rule of criminal procedure which applies when one lawyer represents more than one defendant in the same trial. In this case you are represented by Mr. Rutter's office, and two corporations, I believe, are also represented by this office. The law treats corporations as separate entities, separate parties, so technically the rule applies.

"We've asked you to give us the information on who was in control of these companies, and you have done that, and we want you to understand that it is possible that each party should have separate counsel to avoid conflicts of interest. I don't see any conflict of interest here because you control both corporations, but you ought to know that by electing to proceed with Mr. Rutter, you give up or waive any right later to say, well, I should have had separate counsel because Mr. Rutter was also representing one of the corporations, and he sold me out in favor of the corporations.

"That is the interest we're protecting here. And if you are willing to have Mr. Rutter represent you and the corporations, it is all right with me, as long as you understand you cannot bring it up later.

"What is your position?

"MR. PERKINS: Your Honor, based on Mr. Rutter's recent statement that he needs more time to review this case to be adequately prepared, I feel I would like to consider time now to get additional counsel, of course, because of this situation.

"THE COURT: Well, I find that it is unlikely that a conflict of interest will arise, so your request is denied. We will allow you to proceed.

"MR. PERKINS: Thank you, Your Honor."[6]

Thereafter, in light of the trial court's ruling, trial commenced.

The legal issue concerning the propriety of multiple representation in the face of the objection by Petitioner set forth above was raised in Petitioner's appeal to the United States Court of Appeals for the Third Circuit. In Petitioner's Brief in the Court of Appeals, Petitioner urged the application of a *per se* rule of reversal where there is an objection to multiple representation expressed to the trial court prior to trial and where there is no meaningful inquiry with respect to such joint representation and where there is then no factual basis in the trial record upon which the court could find that no conflict of interest was likely to arise. In the Judgment Order attached hereto (Appendix, p. 1a), this contention was rejected.

IX. REASONS FOR GRANTING THE WRIT

The Sixth Amendment to the United States Constitution provides that in a criminal prosecution, an accused shall enjoy the right to assistance of counsel for his defense. This Court has consistently held that this right includes the right to representation by separate counsel. That is, an accused is entitled to counsel whose attention and loyalty is undiminished by that counsel's representation of other defendants in the same or related cases. *Wood v. Georgia*, 450 U.S. 261 (1981); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Glasser v. United States*, 315 U.S. 60 (1941).

This Sixth Amendment right to separate representation of counsel is implemented by Rule 44(c), Federal Rules of Criminal Procedure, which provides that where

6. This quotation is taken from the Appendix filed in the Court of Appeals, Vol. I, pp. 135-138.

more than one defendant is represented by the same attorney, the trial court "shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation." Under Rule 44(c), then, following a defendant's articulated request for separate representation, the lower court is required to permit separate representation. Absent such separate representation, with the exception of Petitioner's case in the Third Circuit, other Courts of Appeals have been uniform in applying a *per se* reversal rule. *See, e.g., United States v. Ramsey,* 661 F.2d 1013, 1018 (4th Cir. 1981) (reh. denied), *cert. denied,* 455 U.S. 1005 (1982); *United States v. Mers,* 701 F.2d 1321, 1327 (11th Cir.), reh. *en banc* denied, 707 F.2d 523, *cert. denied sub nom., Ferrante v. United States,* 104 S.Ct. 481 (1983).

There are four decisions of this Court relevant to the issue presented in this Petition which clearly demonstrate that the decision of the Court of Appeals below was inconsistent with the applicable law as set forth by this Court. From these four decisions, the following rules emerge:

1. A trial court must conduct an inquiry of jointly represented defendants to determine whether they are aware of the dangers inherent in joint representation.

2. If a jointly represented defendant objects to multiple representation, he *must* be allowed to secure other counsel. Only if the trial court, after full inquiry, determines that the request for separate representation is totally specious *might* the trial court be permitted to order continued joint representation.

3. The failure to conduct such an inquiry, after an objection to joint representation by a defendant, constitutes reversible error.

4. If the court fails to conduct a Rule 44(c) inquiry in the *absence* of any articulated objection by a defendant or if, after inquiry, a defendant waives his objection to joint representation then a defendant, who first raises an

objection to joint representation, *after trial*, must prove that an actual conflict of interest adversely affected his legal representation.

In *Glasser v. United States*, 315 U.S. 60 (1941), defendants Glasser and Kretske appeared in court for trial, each represented by separate counsel. Kretske's attorney was allowed to withdraw when the trial court appointed Glasser's attorney also to represent Kretske. In a colloquy immediately before this appointment of counsel, Glasser objected to having his attorney appointed to represent Kretske; Glasser's attorney stated that there existed "some little inconsistency in the defense(s)." 315 U.S. at 68.

Glasser and Kretske were convicted and appealed, claiming that their Sixth Amendment rights had been violated. This Court identified from the trial record a conflict of interest in one attorney's representation of both defendants. However, even after identifying a conflict, the Court went on to state:

> "There is yet another consideration. Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. *Irrespective of any conflict of interest* the additional burden of representing another party may conceivably impair counsel's effectiveness." *Glasser, supra*, 315 U.S. at 75 (emphasis added).

The Court reversed Glasser's conviction without requiring him to demonstrate any prejudice, but affirmed Kretske's conviction because Kretske had agreed to be represented by Glasser's attorney and could not demonstrate any prejudice.

These principles were reaffirmed thirty-seven years later in *Holloway v. Arkansas*, 435 U.S. 475 (1978), where one appointed attorney represented three codefendants charged with robbery. The attorney petitioned for separate representation because there was "a

possibility of a conflict of interest in each of their cases", but the motion was denied. On the day of trial, counsel again moved for separate counsel because one or more of the defendants would testify, and the single attorney could not effectively cross-examine the testifying defendant to protect the rights of the other defendants. The motion was again denied. During trial, all three defendants testified, and the trial court ordered the attorney to present the direct testimony of each defendant. During the direct testimony of one of the defendants, one of the other defendants attempted to make an objection to the testimony, but the court instructed the objecting defendant that the attorney would have to make the objection. This series of events still did not convince the lower court to alter its rulings. All three defendants were convicted.

This Court held that the failure of the trial court either to "appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel, deprived petitioners of the guarantee of "assistance of counsel". *Id.*, 435 U.S. at 484. The Court cited *Glasser*, stating that the trial court had the duty to refrain from "*insisting . . . that counsel undertake to concurrently represent interests which might diverge . . . when the possibility of that divergence is brought home to the court.*" *Id.*, 435 U.S. at 485 (emphasis in original).

As to what showing was required by the defendants to gain a reversal of their convictions, the Court stated, in construing *Glasser*, that:

> ". . . whenever a trial court improperly requires joint representation over timely objection reversal is automatic." *Id.*, 435 U.S. at 488.

This Court also noted "that the prejudice is presumed regardless of whether it was independently shown" and "that the assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.' " *Id.*, 435 U.S. at

489.[7]

In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), three codefendants were represented by the same two attorneys who worked together on the defense of all three defendants whose trials were severed. The defendant who was tried first and convicted and appealed on the ground that his lawyers had a conflict of interest manifested by the lawyers' failure to call defense witnesses who were later called at the codefendants' trials.

Of great importance to this Court was that Sullivan had *not* objected to the multiple representation. Under *these* circumstances — the absence of an objection — the Court held that petitioner "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.*, 446 U.S. at 348 (footnote omitted).

Sullivan noted that in *Holloway* the Court "did not consider whether the alleged conflict actually existed", but rather ruled that "the trial court's failure to respond to timely objections'" was constitutional error requiring reversal. 446 U.S. at 345. *Sullivan* reaffirmed the *Holloway* rule that "a defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial." *Id.*, 446 U.S. at 348. The Court immediately went on to state:

> "But unless the trial court fails to afford such an opportunity, a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel." *Id.*

These statements reaffirm the *Holloway* and *Glasser* principles that the failure to afford an opportunity to show

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7. The dissent was critical because the majority found a Constitutional violation because of the "failure to conduct [the] inquiry, without any additional determination that the record reveals a case of joint representation in the face of 'conflicting interests' " *Id.*, 435 U.S. at 492. The dissent vigorously disagreed with the rule requiring automatic reversal for failure to conduct an inquiry.

how a potential conflict does imperil a fair trial will require an appellate court to presume that the *possibility* for conflict has resulted in a Sixth Amendment violation.

Finally, in *Wood v. Georgia*, 450 U.S. 261 (1981), the facts of which are not relevant here, this Court noted that the *Sullivan* decision:

> ". . . *mandates* a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.' " *Id.*, 450 U.S. at 272 (footnote 18) (emphasis in original).

In the case at bar, the trial judge did commence an inquiry, but summarily ordered Petitioner and his two codefendants to trial without even attempting to determine whether, in the words of *Holloway*, "the risk was too remote to warrant separate counsel."

The *per se* rule, under these circumstances, has been acknowledged by other circuit courts. *See, Wilson v. Morris*, 724 F.2d 591, 593 (7th Cir. *en banc*), *cert. denied* 104 S.Ct. 2357 (1984); *United States v. Ramsey, supra; United States v. Mers, supra.*

The application of these rules to the facts of this case is straightforward. Where a defendant requests separate counsel and does not waive his right to separate representation, absent a full inquiry by the lower court and supportable findings concerning a lack of conflict of interest, a *per se* reversal is required. In this case, the Petitioner, when questioned by the lower court, did not waive his right to separate representation but instead requested separate counsel. Under the circumstances, in light of the applicable decisions of this Court discussed above, a reversal of the conviction by the Court of Appeals below was necessary.

Rule 17.1 of the Rules of this Court suggests that this Court's discretion with respect to the *certiorari* decision will be guided by certain factors. In this case, two of these factors are applicable. First, pursuant to Rule

17.1(c), it is apparent that the decision of the Court of Appeals below was entirely inconsistent with this Court's decisions in *Glasser*, *Holloway*, *Cuyler* and *Wood*. Further, pursuant to Rule 17.1(a), it is apparent that the decision of the Court of Appeals below was inconsistent with the *en banc* decision of the Seventh Circuit in *Wilson*, *supra* and the decision of the Eleventh Circuit in *Mers*, *supra*.

This case presents an important question of federal constitutional law and an important question concerning the proper construction and application of the rule implementing the Sixth Amendment right to separate representation, Rule 44(c) of the Federal Rules of Criminal Procedure. The Petitioner Sidney Perkins respectfully requests this Court to grant a Writ of Certiorari and set this case down for briefing and argument on the merits.

X. CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Writ of Certiorari should be granted.

Respectfully submitted,

RUTTER, TURNER & STEIN

By_____
Thomas B. Rutter

By_____
Alan A. Turner
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1207
No. 84-1231
No. 84-1232

UNITED STATES OF AMERICA

v.

SIDNEY PERKINS,
Appellant in No. 84-1207
Criminal No. 83-00002-01

UNITED STATES OF AMERICA

v.

NORTH BROWARD INDUSTRIES, INC.
GOVERNMENT SALES DIVISION,
Appellant in No. 84-1231
Criminal No. 83-00002-05

UNITED STATES OF AMERICA

v.

SOUTHERN COMMERCIAL, INC.,
Appellant in No. 84-1232
Criminal No. 83-00002-06

APPEAL FROM JUDGMENTS OF CONVICTION IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

District Judge: Honorable Edward N. Cahn

Argued October 22, 1984

BEFORE: SEITZ, and ADAMS, *Circuit Judges*, and FISHER, *Circuit Judge.**

JUDGMENT ORDER

After consideration of the contentions raised by appellant, to-wit, that, (1) the trial court failed adequately to protect appellants' rights to the effective assistance of counsel in the face of appellants' objection to proceeding to trial with a single attorney representing all three appellants and the court being of the opinion that on this record an ineffective assistance of counsel issue is not presented, (2) the enterprise charged in the indictment did not have an existence separate and apart from the pattern of racketeering, (3) an enterprise cannot consist of a group of corporations, (4) the crime set forth in 18 U.S.C. §§201(f) cannot be a predicate offense for a RICO violation, (5) the government is estopped from prosecuting appellants for the violations of 18 U.S.C. §287 contained in counts 33, 34, 35, 36, 38 and 39 because the federal agency to whom the claims were made had reached an agreement with appellants as to how future claims were to be submitted (6) the trial court improperly allowed the jury to consider, under the conspiracy count, the dollar amount of appellants' "mark up" on goods delivered to the government under the contracts, as being a basis to prove the conspiracy, and (7) the evidence was insufficient to establish appellants' guilt on certain of the counts charging violations of 18 U.S.C. §287 (fraudulent claims), it is

*Honorable Clarkson S. Fisher, Chief Judge, United States District Court for the District of New Jersey, sitting by designation.

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

_____

Circuit Judge

ATTEST:

_____

Chief Deputy Clerk

DATED: October 30, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL
	:	No.
SIDNEY PERKINS,	:	83-00002-01
BERNARD OSSER,	:	02
ROSE MORRIS,	:	04
NORTH BROWARD INDUSTRIES, INC.,	:	05
Government Sales Division	:	06
SOUTHERN COMMERCIAL, INC.	:	

MEMORDANDUM OPINION

CAHN, *J.* February 13, 1984

Before me are motions for post-verdict relief filed by defendants Sidney Perkins, Bernard Osser and Rose Morris. The 42-count indictment in this case charged the above-named defendants with conspiracy to defraud the United States by rigging bids to a defense procurement agency. The Government alleged that defendant Sidney Perkins had set up six corporations to appear to be separate and independent vendors bidding competitively for defense contracts. Using these corporations, Perkins rigged and manipulated bids submitted to the Defense Industrial Supply Center in Philadelphia (DISC), an arm of the Department of Defense. The Government further alleged that Perkins, in exchange for cash and other gratuities, obtained technical drawings from Bernard Osser, a contracting officer at DISC, and Rose Morris, a file clerk at the Naval Air Technical Services Facility (NATSF) in Philadelphia. According to the Government, Osser assisted Perkins in preparing claims submitted to DISC in return for trips to Florida and other things of value and, in addition, negotiated with Perkins regarding future employment without informing his DISC superiors. The Government charged all defendants with conspiracy un-

der 18 U.S.C. §371, and with violations of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §1961 *et seq.* The Government charged defendant Perkins with separate counts of bribery, 18 U.S.C. §201(b), offering gratuities, 18 U.S.C. §201(f), wire fraud, 18 U.S.C. §1343, and filing false claims, 18 U.S.C. §287. The Government charged defendant Osser with accepting gratuities, 18 U.S.C. §201(g), and acting, as a government official, upon a matter in which a contractor with whom he was negotiating future employment had a financial interest, 18 U.S.C. §208(a).

A jury trial in this case began May 9, 1983. At the close of the Government's case, I granted a motion for aquittal in favor of Rose Morris, under Federal Rule of Criminal Procedure 29, as to the conspiracy and RICO counts of the indictment (Counts 1 and 2) (N.T. 12-260). On June 6, 1983, the jury returned a verdict of "guilty" as to all defendants. Defendant Perkins was found guilty of the conspiracy and RICO counts, and in addition was convicted of two counts of bribery (Counts 3 and 5), five counts of offering gratuities (Counts 19, 22, 24, 26 and 28), three counts of wire fraud (Counts 30, 31 and 32), and nine counts of filing false, fictitious or fraudulent claims (Counts 33-39, 41 and 42). Perkins was acquitted on five counts of offering gratuities (Counts 9, 11, 13, 15 and 17). Defendant Osser was found guilty of conspiracy, of accepting gratuities (Count 18), and of participating personally and substantially as a government officer in advising an entity with whom he was negotiating future employment (Count 20). Osser was acquitted of the RICO charge (Count 2), and of five charges of accepting gratuities (Counts 8, 10, 12, 14 and 16). Defendant Morris was found guilty of five counts of accepting gratuities (Counts 21, 23, 25, 27 and 29).

Each of these defendants seeks post trial relief. I will deny all of these motions for the reasons set forth below.

I.
Sidney Perkins

Perkins has filed two motions with this court: a motion for arrest of judgment as to Count 2 of the indictment (RICO) or in the alternative for judgment of acquittal as to Count 2; and a motion for a new trial as to the entire indictment or in the alternative as to Count 2.

The basis for the first motion is that the indictment's description of the "enterprise" here, the corporations controlled by Perkins, does not conform to the statutory definition of enterprise found in 18 U.S.C. §1961(4).

Perkins argues that a group of corporations is not included within the section 1961(4) enterprise definition, and that the Government therefore did not prove the existence of a RICO enterprise. Section 1961(4) provides:

> "Enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

Perkins' argument is not persuasive, for two reasons. First, there is no reason to believe that Congress intended to restrict the category of entities that may constitute RICO enterprises to only those listed in the statute. A more literal reading of the statute suggests that the statutory listing is non-exhaustive, and that by use of the words "Enterprise includes," Congress intended the statutory language to be interpreted broadly. The Court of Appeals has recognized the non-exclusive nature of the statutory listing. *See United States v. Aimone,* 715 F.2d 822, (3d Cir. 1983) (group of individuals and single corporation may together constitute a RICO enterprise).

In addition, the Second Circuit Court of Appeals has explicitly held that an interpretation of section 1961(4) that would exclude a group of corporations from the enterprise definition would "make [n]onsense of the stat-

ute," *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980), especially in light of Congress' mandate that RICO provisions shall be liberally construed to effectuate the statute's remedial purposes. *Id.* Judge Feinberg's reasoning in *Huber* is persuasive. *See also United States v. Aimone*, 715 F.2d at 828 (*citing Huber* with approval).

Perkins' motion for a new trial also relies upon a definitional section of the RICO statute. Perkins was convicted of five counts of offering gratuities to public officials in consideration of services performed, in violation of 18 U.S.C. §201(f). Perkins argues that violations of section 201(f) should not be considered predicate offenses for purposes of the RICO statute.

In section 1961(1)(B), Congress has listed 18 U.S.C. §201 as a predicate RICO offense, and following the section 201 listing is the parenthetical phrase "(relating to bribery)". Defendant argues, first, that there is a meaningful distinction between offering bribes (§201[b] and offering gratuities (§201[f]); and second, that by its use of the phrase "(relating to bribery)," Congress intended that the RICO statute cover only section 201(b) violations.

This argument is without merit. Following each of the twenty sections of Title 18 listed in section 1961(B) which may be used as predicate RICO offenses, there is a parenthetical phrase briefly describing the criminal activity covered by the statute, usually in the form of a summary of the statute's title. None of these parenthetical phrases are used to limit the reach or to discriminate among parts of the statutes they describe. The parentheticals are only "visual aids," designed to guide the reader through what would otherwise be a litany of numbers.

It is true that under federal law the offenses of bribery and gratuities are not similar in all respects; bribery

requires proof of a "quid pro quo".[1] State law bribery, however, defined as a predicate RICO offense in 18 U.S.C. §1961(1)(A), includes any state statute covering "conduct which is intended, at least by the alleged briber, as an assault on the integrity of a public office or an official action." *United States v. Forsythe*, 560 F.2d 1127, 1137 n.23 (3d Cir. 1977), *citing United States v. Dansker*, 537 F.2d 40, 48 (3d Cir. 1976). The five section 201(f) counts allege that Perkins funneled cash to Morris and gave airline tickets to Osser "for and because of official acts performed and to be performed" by them. There is no basis for distinguishing between federal and state law offenses encompassed by the general bribery category, and the section 201(f) counts here clearly fall within the *Forsythe* and *Dansker* definitions of RICO bribery.

Even if there were a valid reason to distinguish between sections 201(b) and 201(f) for purposes of RICO, however, the RICO count against Perkins would stand. This is true by virtue of the fact that Perkins was also convicted on two counts of section 201(b) bribery and three counts of section 1343 mail fraud, all five of which indisputably are predicate offenses under RICO.

For all of the above reasons, defendant Perkins' motions for post-verdict relief will be denied.

II.
Bernard Osser

Defendant Osser submits four bases for post verdict relief. First, Osser argues that there was insufficient evidence of conspiracy to submit the conspiracy count against him to the jury, and that his motion for acquittal

1. In addition, the penalties for bribery are up to 15 years imprisonment and a $20,000 fine, while the penalties for gratuities are up to 2 years imprisonment and a $10,000 fine. This difference is insufficient to delete §201(f) offenses from the category of RICO bribery, inasmuch as any state law bribery offense punishable by imprisonment for more than just a single year may serve as a predicate RICO offense under 18 U.S.C. §1961(1)(a).

as to the conspiracy count should have been granted at the close of the Government's case.

I agree with the Government that there was sufficient evidence to warrant the conclusion that Osser knowingly participated in the conspiracy and thus to justify submitting the conspiracy count against Osser to the jury.

Osser's position at DISC was Chief of the Post Award Branch, and his function was to review non-deliveries and late deliveries. There is substantial evidence that Osser assisted the Perkins' companies outside of his official capacity, in the pre-award stage. That evidence includes the repeated business and vacation trips taken by Osser to Florida at Perkins' expense, and substantial testimony by Sharon Gray, an employee of Perkins at Southern Commercial in Florida, who in effect was an unindicted co-conspirator in this case. Gray, who had been granted immunity (N.T. 3-97), testified to the following: Perkins said he was paying Osser while Osser was employed at DISC (N.T. 3-82); Perkins sent Osser special lists of drawings for parts (N.T. 3-44), and sent many of these lists to Osser's home address despite DISC office policy never to receive official mail at home (N.T. Berk 8-26); Osser, while a government employee, would send drawings via Federal Express in response to those requests to Perkins in Florida (N.T. 3-50, 3-242); Osser sent Perkins information on particular contracts filled by a Perkins company, which were the subject of a government investigation (N.T. 3-65); Osser retired early because of government investigations into his role at DISC (N.T. 3-80); Osser and Perkins reached an agreement about Osser's future employment with Perkins at North Broward Industries on April 24, 1981, and the employment contract stated that Osser's services had begun on February 16, 1981, the date of his early retirement from DISC (N.T. 3-86); Perkins stated, referring to the employment contract, that that contract would make it "legal" now (N.T. 3-84); Osser came to Perkins' establishment in Florida 6 to 7 times prior to February of 1981, the date of his DISC

retirement (N.T. 3-87); Perkins put expenses for airline tickets, food and accommodations for Osser and his wife on Perkins' American Express card (N.T. 3-90); Osser aided Gray in formulating a letter on behalf of Bucks Aircraft Industries, Inc. (one of the Perkins' controlled companies) addressed to a DISC employee, in response to an inquiry concerning eight orders that had not been shipped (N.T. 3-94); Osser then reviewed the letter to determine if the DISC employee would accept Bucks' explanation (N.T. 3-236). Osser repeatedly failed to inform his superiors or to disclose to the appropriate people at DISC his continuing relationship with Perkins and with the Perkins-controlled companies (N.T. Burke 8-23-26).

In addition, Mr. William Redden, responsible as Branch Supervisor in the Quality Assurance Division at DISC for reviewing customer complaints about DISC material, testified that, from 1978 to 1979, he obtained aperture cards[2] and paper copies of drawings 3 to 4 times every month from the DISC drawing repository for Osser at Osser's request. He additionally testified that none of these drawings were ever returned to him (N.T. 6-46-7, 6-53).

Additional evidence came from Joel Lipschultz, owner of Precision Fasteners, Inc., one of the Perkins-controlled companies, who testified in accordance with a plea agreement with the United States government (N.T. 6-215). Lipschultz testified that in 1979, at the Elan Club in Philadelphia, he saw Perkins and Osser together. Osser was holding an envelope full of cash, and Perkins was holding an envelope containing aperture cards, and at least one card was stamped "limited," *i.e.*, proprietary (N.T. 7-36-38).

The jury was entitled to draw an inference of an illicit association from this evidence. As the Supreme Court

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2. Aperture cards are government computer cards containing a microfilm copy of an engineering drawing for a defense-related part.

has stated, the proof in these types of cases "by the very nature of the crime, must be circumstantial and therefore inferential to an extent varying with the conditions under which the crime may be committed." *Direct Sales Co. v. United States*, 319 U.S. 703, 714 (1943).

Counsel for Osser submits two cases in support of his position that the government did not prove the specific knowledge needed to submit the conspiracy count to the jury. These two cases are *United States v. Tavoularis*, 515 F.2d 1070 (2d Cir. 1975), and *United States v. Klein*, 515 F.2d 751 (3d Cir. 1975). In these two cases there was no quantum of evidence *at all* from which an inference might be drawn that the defendant knew of the conspiracy's illicit purpose.[3] The instant case is quite different. For this reason, neither case is controlling here.

In summary, the testimony as reviewed supports my prior ruling that the evidence was sufficient to warrant the inference that Osser was a knowing participant in the conspiracy.

Mr. Osser's second basis for relief is that the testimony of William Redden regarding Redden's obtaining drawings from the DISC repository for Osser at Osser's request was unfairly prejudicial and should not have been

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3. *Tavoularis* involved a conspiracy to possess treasury bills knowing the bills to be stolen from a bank, in violation of 18 U.S.C. §§211(3)(c) and 371. The court held that the government had failed to prove that the defendants knew that the bills they possessed were stolen from a bank, an essential element of the §211(3)(c) offense, and that "an inference of participation in the theft" on the facts of *Tavoularis* "would verge on the irrational." *Id.* at 1075. The §211(3) offense was the centerpiece of the conspiracy and a failure of any proof at all as to the offense's central element required reversal of the guilty verdicts. In *Klein* , the court reversed the conviction of a public insurance adjuster for mail fraud and conspiracy to defraud several insurance companies of proceeds owing on fire insurance policies, in connection with a scheme to destroy a hotel by fire for the policy proceeds. The appellant was hired after the arson to prepare proof of loss forms. The court found no evidence whatsoever of appellant's knowledge of an illicit purpose.

admitted under Federal Rule of Evidence 403. I disagree. Osser testified that he obtained requests for drawings by Federal Express mail from Perkins at Osser's home (N.T. 12-207), 12-242), and that he would expedite the requests for DISC documents on Perkins' behalf (N.T. 12-208). The Redden testimony was offered to show that Osser had access to aperture cards, and used that line of access regularly over a substantial period of time. This evidence, together with Osser's own testimony, legitimately gives rise to an inference that Osser knowingly furthered the objectives of the conspiracy by obtaining drawings for Perkins without disclosure to his superiors or fellow DISC employees.

Osser's third basis for relief is that there is insufficient evidence to support the jury's verdict of guilty on Count 20 of the indictment. Count 20 alleged a violation of 18 U.S.C. §208(a), in that Osser, as a government employee, participated "personally and substantially" in a matter in which a company with whom he was negotiating employment had a financial interest. The jury found Osser guilty on Count 1, the conspiracy count, and I have found that there was sufficient evidence before the jury upon which it could base a finding that Osser knowingly furthered the criminal conspiracy. The evidence sustaining the conspiracy finding — the meeting at Elan, the Redden, Gray, and Lipschultz testimony, together with Osser's own testimony that he expedited document requests for Perkins although his official dealings with contractors were limited to the post-award phase — taken together amply support a finding that Osser aided Perkins "personally and substantially".

Osser's fourth basis for relief is that two items of testimony did not fall within the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E), and were improperly admitted. These items are the following: Sharon Gray, Perkins' employee at North Broward Industries, testified that Perkins said he was paying Osser while Osser was employed at DISC (N.T. 3-82). Margaret

Gureghian, an employee at E.J. Wirth Co., a Perkins-controlled company, testified that on January 23, 1981, Perkins told her he found out through Osser that two of the Perkins-controlled companies, Wirth and Bucks Aircraft, were being investigated (N.T. 4-96-97). She also testified that Perkins had told her he was waiting to receive drawings from Osser (N.T. 4-68).

Co-conspirator statements may be admitted under Rule 801(d)(2)(E) only if they satisfy three requirements. First, the statements must have been made during the life of the conspiracy. Second, there must be independent evidence establishing that Osser participated in the conspiracy. Third, the Perkins' statements must be in furtherance of the conspiracy. *See United States v. Nixon*, 418 U.S. 683, 701 (1974); *United States v. Ammar*, 714 F.2d 238, 245 (3d Cir. 1983).

The first requirement of the rule is satisfied here. Under the second requirement, the prosecution must lay a foundation for the admission of co-conspirator hearsay by establishing the existence of a conspiracy including Osser by "a fair preponderance of independent evidence". *United States v. Trotter*, 529 F.2d 806, 811-13 (3d Cir. 1976). This "preponderance" standard simply requires the trial judge to find "that the existence of the contested fact is more probable than its nonexistence." *United States v. Trotter*, 529 F.2d at 812 n.8. The prosecution must show Osser's participation in the conspiracy, *i.e.*, agreement, by independent evidence, *United States v. Klein*, 515 F.2d 751, 753, but "[p]articipation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and collocation of circumstance.' " *United States v. Schoenhut*, 576 F.2d 1010, 1027 (3d Cir.), *cert. denied*, 439 U.S. 964 (1978), *citing Glasser v. United States*, 315 U.S. 60, 80 (1942). Evidence of participation in the conspiracy must be considered in the light most favorable to the government on review of the jury's guilty verdict. *Id.* at 1014. The non-hearsay Gray testimony, the

Lipschultz testimony, the Redden testimony, together with the repeated trips to Florida, the document requests addressed to Osser's home, his own admission that he expedited matters at DISC for Perkins despite the fact that pre-contract matters were not within the scope of his DISC position, his failure to disclose at any time his dealings with Perkins to his DISC superiors, all support my initial finding that Osser participated in the conspiracy.[4]

The third requirement that must be met in order for co-conspirators' statements to be admissible is that the statement must be "in furtherance" of the conspiracy. It is true that statements made by Perkins about Osser to those who are not involved in the conspiracy in any way would not satisfy the "in furtherance" requirement. *United States v. Provenzano,* 620 F.2d 985, 1000-01 (3d Cir.), *cert. denied,* 449 U.S. 899 (1980). Here, both Gray and Gureghian were granted immunity by the government. Both were key employees in Perkins' operation, essential figures in the process by which Perkins' directives were carried out and low bid information was received and transmitted from DISC to Perkins offices in Florida. In effect, Gray and Gureghian were unindicted co-conspirators. As such, they were not mere bystanders to the conspiracy, mere "errand runners". *See Provenzano* at 1001 (although statement to bystander doesnot fall within co-conspirator exception, statement to employee who ran conspirator's business is "in furtherance" of conspiracy).

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4. There is no requirement that the independent evidence of Osser's involvement in the conspiracy be introduced prior to the introduction of the Perkins' statements; and, accordingly, my decision to admit these statements subject to later validation by the prosecution's laying of the proper basis for admitting the questioned evidence is not error. United States v. Ammar, 714 F.2d 238, 246-7 (3d Cir. 1983); United States v. Zepeda-Santana, 569 F.2d 1386, 1388 (5th Cir.), *cert. denied,* 439 U.S. 907 (1978); United States v. Jackson, 549 F.2d 517, 533 (8th Cir.), *cert. denied,* 430 U.S. 985 (1977).

Accordingly, the three requirements are satisfied, and the Perkins' statements were properly admitted under Rule 801(d)(2)(E).

For all of the above reasons, the Osser motions for post-verdict relief will be denied.

III.
Rose Morris

Morris submits three grounds in support of her motion for a new trial: first, that Morris was prejudiced by the U.S. Attorneys' mischaracterization of some of the evidence against Morris in their closing arguments; second, that the court erred in permitting counsel for Perkins to question witness Daniel Lipschultz about his dealings with Morris immediately prior to the time period of the conspiracy; and third, that the court erred in denying a motion for severance or for a mistrial following the grant of Morris' motion for acquittal as to the conspiracy and RICO counts of the indictment, and following the admission of the Lipschultz testimony. Each of these arguments will be considered.

A. *Prosecutorial Misconduct*

One Assistant United States Attorney, in his initial closing argument, mischaracterized the testimony of Dorothy Boggs, a government witness, as follows: "A fellow co-worker of Rose Morris . . . observed that Rose Morris tried to carry out a whole shopping bag of drawings. What happened? She was stopped. They found out about it and she was admonished and told never to do it again." (N.T. 13-210-11). In fact, the Boggs' testimony was very different, as follows: "I had seen her put a stack of drawings in a shopping bag . . . [u]nder her desk . . . [j]ust once." (N.T. 7-214-5). Boggs also testified that she had mentioned the incident to another employee at DISC, Nancy Richardson, who talked to Morris and also mentioned it to Morris' supervisor, but knew nothing about

Morris' being "admonished" or "told never to do it again." (N.T. 7-215-16).

Counsel for Morris corrected any misimpression that the United States Attorney's closing statement might have made by reminding the jury of the actual testimony. (N.T. 14-98).

In rebuttal, the other Assistant United States Attorney characterized Morris' direct testimony incorrectly, taking as his point of departure that Morris had admitted that she had provided Joel Lipschultz with drawings even after she believed he had left government employ. He then analyzed the remainder of her testimony against this background and urged upon the jury his belief that, taken as a whole, her story was not believable. (N.T. 14-124-5). In fact, Morris had testified that she stopped expediting the processing of drawings for Lipschultz as soon as she believed he had left government employ.

In my charge to the jury, I emphasized that the lawyers' statements are not evidence. (N.T. 14-132). I said the following: "There was so much evidence in this case that on occasion the lawyers, in their closing arguments, have presented what they thought the facts to be to you and another lawyer presented a different set of facts. You are not bound by what the lawyers say about the facts. You use your own collective judgment . . . [I]t's your recollection that controls." (N.T. 14-133). I repeated this instruction to the jury throughout the trial. Any prejudice that may have resulted to Morris from the prosecutor's statements was neutralized by this instruction. *See United States v. Brisco*, 473 F. Supp. 303, 308 (D. Del. 1979), *aff'd wo. opinion*, 615 F.2d 1354 (3d Cir. 1980).

B. *Motions for Severance or a Mistrial*

Counsel for Morris also argues that the court erred in not granting a severance or mistrial at several phases of the proceedings: before the start of the trial; following the grant of acquittal as to the conspiracy and RICO counts; and following two separate items of testimony.

These items were, first, testimony by Margaret Gureghian that Perkins had identified Morris as one of the sources for drawings; and second, testimony by Daniel Lipschultz during cross-examination by counsel for Perkins that Lipschultz had gotten documents from Morris in the year before the start of the conspiracy alleged in the indictment. (Counsel for Perkins had alleged that this evidence was relevant to Perkins' defense of extortion by Morris or other government officials.) Counsel for Morris asserts that the admission of this testimony, along with the spillover effect of the days of testimony relating to Perkins' scheme to defraud the United States Government using documents supplied in part by Morris, taken together are sufficiently prejudicial to Morris to warrant a new trial.

There was no error in refusing a severance pretrial; there is no allegation that the naming of Morris in the conspiracy and RICO counts of the indictment was in bad faith.

The denial of Morris' subsequent motions for severance is more troublesome, and warrants some discussion of each of the point raised by her counsel. On balance, I find that the highlighted testimony does not represent the compelling or substantial prejudice necessary to support her assertion that the trial as to Morris was unfair. My reasoning is as follows:

1. Spillover Effect and Gureghian's Testimony.

The Government's method of presenting its evidence in this case carefully delineated separate events and occurrences, and thus protected against confusion. My observation of the jury leads me to believe that it was able to follow my instructions to keep the evidence compartmentalized as to each defendant. (N.T. 14-141). The only point of intersection between the evidence presented relating to Perkins' operations and the separate evidence about the dealings between Morris and the Lipschultzes came from Maragaret Gureghian. Gureghian said that Perkins had told her that Morris was the source of the

drawings from NATSF (N.T. 4-61; 4-68). This statement was clearly admissiable against Perkins as an admission by a party opponent under Rule 801(d)(2)(A) and was offered by the government only against Perkins to show his knowledge and state of mind. I specifically instructed the jury that the statement was to be considered only as to Perkins and not against Rose Morris. (N.T. 4-67). In light of that instruction, this statement was not sufficiently prejudicial to warrant the grant of a new trial. *See United States v. Losada*, 674 F.2d 167, 171 (2d Cir.), *cert. denied*, 457 U.S. 1125 (1982).

2. Cross-Examination of Daniel Lipschultz.

Daniel Lipschultz testified that he worked for the Department of Defense until January of 1978, and then left to work for Pooley Machine Co. along with his son, Joel, where he met Sidney Perkins. While at Pooley, part of his responsibilities involved obtaining aperture cards from DISC and NATSF. He left Pooley in January of 1979 to work for Perkins. He testified that during the month he remained in Philadelphia as a Perkins employee he obtained drawings from Rose Morris at NATSF on an expedited basis, (N.T. 6-151), and in return would pay $5.00 in cash for each drawing. (N.T. 6-152-3). In addition, he received government request forms for drawings from Morris. (N.T. 6-166). On cross-examination by counsel for Perkins, I allowed inquiry into the start of the relationship between Lipschultz and Morris as relevant to Perkins' defense that Morris was extorting the payments for drawings. (N.T. 6-83). The conspiracy alleged in the indictment began in January, 1979. Lipschultz revealed that his relationship with Morris began in 1978, (N.T. 6-189), and that at that point Morris said she would provide expedited service for $5.00 per drawing. (N.T. 6-191). Counsel for Morris moved for a mistrial based upon the admission of this evidence (N.T. 6-236). I held the evidence relevant to Morris' state of mind as to the bribery counts in anticipation of Morris' defense that she believed Lipschultz to be a government employee. (N.T.

6-236). I offered to give cautionary instructions to the jury that the evidence should not be used in evaluating the guilt or innocence of Morris but only in evaluating the Perkins' defense of extortion. (N.T. 7-2). Counsel for Morris asked that the instruction not be given at that time but indicated that she would request such an instruction at the close of trial. (N.T. 7-3). Counsel for Morris did not ask that this instruction be given.

The case against Morris turned on the relative credibility of Morris and of Daniel and Joel Lipschultz. The Lipschultzes testified that they gave lists of drawings to Morris and received drawings in return at $5.00 per copy over the conspiracy time period. The drawing request rapidly accelerated to 500 to 600 per week. Morris filled 15 to 20 percent of their requests (N.T. 6-160-61) and they paid Morris approximately $2,000.00 per month over a substantial period of time during the conspiracy. The indictment alleged only five monthly payments to Morris of $2,000.00 each, spread over the period between January of 1981 and February of 1982. Subsequent to the Lipschultz testimony, I granted Morris an acquittal as to the conspiracy charge of the indictment and therefore the evidence from the Lipschultzes as to payments in 1979 and in 1980 in retrospect, under the defense theory, also should not have been admitted. However, I instructed the jury that Morris was not charged as a conspirator, (N.T. 14-147), and that she was charged only with five separate incidents in separate months of receiving $2,000.00 in exchange for the drawings. I explained: "She denies that she did that and that is a very clear factual decision for you to make. Do you accept the Lipschultz testimony or the Morris testimony? The burden of proof is on the government." (N.T. 14-167; *see also* N.T. 14-132). "The defendants say . . . that it is just as likely that Lipschultz was pocketing the money and pointing the finger at other persons. This is your function: to determine which of those contentions is correct, keeping in mind that for the government to sustain a

conviction it must prove its contentions beyond a reasonable doubt." (N.T. 14-171). I recommended to the jury that it evaluate the case against Morris first, at the very start of their deliberations, before they reached any of the other evidence in the case. (N.T. 14-180). I told the jury to focus on the credibility of the Lipschultz version as opposed to the Morris explanation. I also stressed that the jury's job was to compartmentalize the evidence as to each defendant. (N.T. 14-141). The jury accepted the Lipschultz testimony, and there was more than an ample basis for its conclusion. In this fact situation, the admission of testimony as to activities by Morris in 1978, if it was error at all, was harmless.

For all of the above reasons, defendant Morris' motions for post-verdict relief will be denied.

An appropriate order will be entered denying post-verdict relief as to all defendants.

BY THE COURT:

/s/

EDWARD N. CAHN, *J.*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL
	:	No.
SIDNEY PERKINS,	:	83-00002-01
BERNARD OSSER,	:	02
ROSE MORRIS,	:	04
NORTH BROWARD INDUSTRIES, INC.,	:	05
Government Sales Division	:	06
SOUTHERN COMMERCIAL, INC.	:	

ORDER

AND NOW, this 13 day of February, 1984, IT IS ORDERED that:

1. Defendant Sidney Perkins' Motions for a New Trial, and for Arrest of Judgment as to Count 2 or in the Alternative for Judgment of Acquittal as to Count 2, are DENIED.

2. Defendant Bernard Osser's Motion for Post-Verdict Relief is DENIED.

3. Defendant Rose Morris' Motion for a New Trial is DENIED.

4. The defendants are directed to appear for sentencing on Monday, March 12, 1984, at 3 P.M. in Courtroom 3B, United States Courthouse, Philadelphia, Pennsylvania.

BY THE COURT:

/s/

EDWARD N. CAHN, *J.*

(2)

Office - Supreme Court, U.S.
FILED
MAR 13 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1086

In the Supreme Court of the United States

OCTOBER TERM, 1984

SIDNEY PERKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1086

SIDNEY PERKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in refusing his request on the eve of trial for a continuance of some unspecified duration to enable him to consider whether to retain additional counsel, because the attorney who was representing him and his two wholly owned corporations indicated that he needed more time to prepare the case.

1. Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conspiring to defraud the United States, in violation of 18 U.S.C. 371; two counts of bribery, in violation of 18 U.S.C. 201(b); five counts of offering gratuities, in violation of 18 U.S.C. 201(f); three counts of wire fraud, in violation of 18 U.S.C. 1341; nine counts of filing false statements, in violation of 18 U.S.C. 287; and conducting the affairs or an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962. He was sentenced to

ten years' imprisonment, to be followed by a five-year term of probation. Petitioner also was ordered to pay fines totalling $195,000.

The evidence at trial established that petitioner, acting through two co-defendant corporations wholly owned by him (Pet. 3 n.1)[1] and four other corporations, rigged bids submitted by these entities to the Defense Industrial Supply Center in Philadelphia. At trial, petitioner and his two wholly owned corporations were represented by the same counsel. Prior to trial, petitioner had furnished the district court with an affidavit waiving his right to be represented by separate counsel (Pet. 5). Nevertheless, on the eve of trial, the district court advised petitioner, in accordance with Fed. R. Crim. P. 44(c), that he was entitled to separate counsel "to avoid conflicts of interest" (Pet. 6). Following consultation with counsel, petitioner informed the court that because his attorney "needs more time to review this case to be adequately prepared, I feel I would like to consider time now to get additional counsel" (*ibid.*). The district court denied petitioner's request, finding "that it is unlikely that a conflict of interest will arise" (*ibid.*). By judgment order, the court of appeals affirmed the convictions of petitioner and the two corporations (Pet. App. A1-A3).

2. Petitioner's contention that the district court was required to accede to his request for additional time to consider whether to retain additional counsel is wholly without merit. The Sixth Amendment guarantees a criminal defendant the assistance of counsel unimpaired by a

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[1]Petitioner owned North Broward Industries and Southern Commercial, Inc., both of which were named, together with two other individuals, as co-defendants in the 42-count indictment. Although petitioner and his two corporations jointly appealed their convictions (see Pet. App. A1-A3), the two corporate entities have not joined petitioner in the instant petition or otherwise sought certiorari.

conflict of interest. See, *e.g.*, *Glasser* v. *United States*, 315 U.S. 60, 70 (1942). It thus requires that when a defendant's request for separate counsel focuses "on the probable risk of a conflict of interests," the trial court must "either * * * appoint separate counsel or * * * take adequate steps to ascertain whether the risk [of conflict is] too remote to warrant separate counsel." *Holloway* v. *Arkansas*, 435 U.S. 475, 484 (1978) (footnote omitted). But nothing in the Sixth Amendment prevents a district court from exercising its discretion to avoid undue delay in the conduct of proceedings before it. As this Court recognized in *Holloway*, where a request "for separate counsel is made for dilatory purposes," its holding "does not impair the trial court's ability to deal with counsel who resort to such tactics" (435 U.S. at 486-487).

Here, petitioner owned and controlled the very corporations with which he shared counsel, and he previously had filed an affidavit with the district court waiving his right to be represented by separate counsel. Thereafter, at the suggestion of the Assistant United States Attorney and out of an abundance of caution, the district court conducted an inquiry under Fed. R. Crim. P. 44(c). Petitioner did not then request "separate" counsel on the ground that the lawyer who was representing him and his two wholly owned corporations had a conflict of interest. Instead, he requested time to "consider" whether to retain "additional" counsel because that attorney had stated "that he needs more time to review this case to be adequately prepared" (Pet. 6). Petitioner does not argue that the district court's denial of his request for additional time (*i.e.*, a continuance) in fact caused counsel to render ineffective assistance at trial because he was not adequately prepared or because he needed the assistance of the "additional" counsel to prepare and present the defense. Compare *Morris* v. *Slappy*, 461 U.S. 1, 11-12 (1983). Because that was the only basis of his request in district court, petitioner is not entitled to relief.

Petitioner now attempts to characterize his request for separate counsel as one based on a potential conflict of interest. On that premise, he argues that the district court was required to honor his request and that a per se rule requiring reversal of his conviction is compelled by the Sixth Amendment. See Pet. 7-8, 12-13. As we have shown, however, there is no factual basis for this argument, because the colloquy quoted in the petition demonstrates that petitioner did not request separate counsel because of an alleged conflict of interest, and he previously had signed an affidavit waiving his right to separate counsel. What is more, the district court expressly found that because the two co-defendants were corporations owned and controlled by petitioner, it was unlikely that a conflict of interest would arise.[2] Neither petitioner nor his attorney took issue with this finding at the time or otherwise gave any indication whatever that a conflict of interest existed. Compare *Holloway* v. *Arkansas*, 435 U.S. at 485-486. Nor does petitioner challenge the district court's finding in this Court or suggest that any conflict of interest in fact developed at trial.

This Court made clear in *Holloway* v. *Arkansas, supra*, that even where the issue of a possible conflict of interest is raised, appointment of separate counsel is not required where, as here, the risk of a conflict of interest is "too remote to warrant separate counsel." 435 U.S. at 484 (footnote

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[2]Indeed, it is hard to conceive how the situation could generate a conflict of interest prejudicial to petitioner. Should his interests somehow diverge from those of his corporations, it would remain exclusively within petitioner's power to direct counsel how to proceed.

omitted).[3] Further review of petitioner's fact-bound claim is unwarranted.

It therefore is respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MARCH 1985

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[3]Petitioner errs in contending (Pet. 8, 12) that other courts of appeals have applied a per se rule requiring reversal of a conviction where the trial court did not order separate representation following an objection by the defendant to multiple representation. In *United States* v. *Ramsey*, 661 F.2d 1013, 1018 (4th Cir. 1981), cert. denied, 455 U.S. 1005 (1982), and *Wilson* v. *Morris*, 724 F.2d 591, 593 (7th Cir.) (en banc), cert. denied, No. 83-6462 (May 14, 1984), upon which petitioner relies (Pet. 8, 12), the court of appeals stated only that reversal is required where the district court fails even to inquire into the basis for the objection or the adequacy of the representation in the face of a potential conflict of interest. In the instant case, by contrast, the district court satisfied itself that a conflict of interest was unlikely to arise. In *United States* v. *Mers*, 701 F.2d 1321 (11th Cir.), cert. denied, 464 U.S. 991 (1983), upon which petitioner also relies (Pet. 8, 12), the court likewise did not suggest such a per se rule. It observed that this Court implied in *Holloway* v. *Arkansas, supra*, "that reversal would be automatic 'whenever a trial court *improperly* requires joint representation over timely objection.' " 701 F.2d at 1327, quoting 435 U.S. at 488 (emphasis added). A requirement of joint representation is not "improper" where, as here, the trial court determines that a conflict is unlikely to arise. The court of appeals' order affirming petitioner's conviction in the instant case thus does not conflict with these other decisions, even if we assume, contrary to the record, that petitioner actually objected to joint representation on the ground of a conflict of interest.

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